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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. [redacted] 91

NORTON I. KRETSKE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

The petitioner, Norton I. Kretske, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment and sentence of the United States District Court for the Northern District of Illinois, Eastern Division was entered October 26, 1953, and is not reported, but is printed in the Record filed herewith at page 808.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed March 18, 1955, and is not yet reported but is set forth in the Appendix hereto, and in the certified copy of the Record.

JURISDICTION.

On April 22, 1955, the United States Court of Appeals for the Seventh Circuit entered its order denying a Petition for Rehearing in this cause. This petition is filed within thirty (30) days of the denial of the Petition for Rehearing by the United States Court of Appeals for the Seventh Circuit.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1) 62 Stat. 928.

QUESTIONS PRESENTED.

1. Should a new trial be granted the defendant where he files a petition for such purpose, the contents of which are not denied by the Government, setting forth newly discovered evidence indicating, that the principal witness had committed perjury on a material matter, which evidence was unknown to defendant and his counsel, could not have reasonably been obtained by them, and which, if presented at the trial, may have changed the verdict of the jury?

2. Where a major witness for the Government is an informer who had been held for deportation at Ellis Island and was paroled to the Immigration Department, the better to act as an informer, may the defendant be barred from cross-examining him as to his background by an objection "in the public interest"?

3. May the defendant be barred from cross-examining Government witnesses on important matters testified to on direct examination?

. Does Rule 30 of the Federal Rules of Criminal Pro-
ure prevent the Court of Appeals from consideration
objections to instructions made in chambers and to the
sideration of instructions tendered in chambers prior
he giving of the charge to the jury, at which time full
cussion was made of the objections and the tendered
ructions, but where no objections were made with re-
ct to said instructions after the charge to the jury and
ore its retirement to consider its verdict?

. May not the attorney for the defendant rely upon a
mer decision of the Court of Appeals for the Seventh
cuit holding that objections made in chambers, but not
de after the jury is charged and before its retirement,
suant to said Rule 30, are sufficient to preserve the
tters involved for review?

. Is it proper to give an instruction founded upon
"aiding and abetting" statute when the defendant is
icted and tried as a principal and the record is de-
d of the elements of proof showing that there was, in
t, a person whom the defendant had "aided and
tted"?

. Where the defense of the defendant is that he acted
a lawyer for a client in the sale of the stolen paint-
s, is it not error to give an instruction that if a lawyer
s, abets and advises a client in the commission of a
ne, he is equally guilty with his client, particularly
ere no evidence is introduced that the client actually
mmitted a crime and where he is not named in the in-
tment?

. In the absence of a strict compliance of Rule 30 of
Federal Rules of Criminal Procedure, may not the
rt note the giving of inapplicable and prejudicial in-
uctions and the denial of a proper instruction tendered
the defendant, as plain error?

9. Has "value" as defined in Section 2311, Title 18 U. S. C. A. to be "the face, par, or market value, whichever is the greatest," been proved in a prosecution for possession of paintings of a value in excess of $5,000.00 or more, stolen in interstate commerce, where the only evidence on the question of value is the opinion of experts based upon: (1) that it is a Baroque painting; (2) that it was done by a known artist; (3) that it was a gift of Francis I, King of the Two Sicilies; (4) that it is part of Americana; and (5) that another painting by the same artist is offered for sale at $6,000.00? No evidence of actual market value or of a sale of similar paintings were introduced by the Government.

10. Where the evidence of the defendant proves the actual sale of a similar painting by the same artist within a recent date, is it not error to refuse an instruction tendered by the defendant that an actual bona fide sale is the best evidence of value, and that an offer to sell without an actual sale having been made does not constitute evidence of valne?

11. May a trial judge refuse to inquire of the jurors whether they had read an article published in a newspaper of wide daily circulation in the city where the courthouse is located when the article reports remarks made by him, outside the presence of the jury which were extremely prejudicial to the defendant's case?

12. May the Government retain the fruits of a verdict obtained to a large extent by the flagrant, inflammatory and prejudicial misconduct of the prosecuting attorney?

STATUTES AND RULES INVOLVED.

The pertinent provisions of the Criminal Code involved re:

Title 18 U. S. C. Section 2315.
Title 18 U. S. C. Section 2311.
Title 18 U. S. C. Section 2(a).
Federal Rules of Criminal Procedure, Rule 30.
Federal Rules of Criminal Procedure, Rule 52(b).

These provisions are set out in full in the Appendix ereto.

STATEMENT OF THE CASE.

Petitioner and one, Joseph DePietro, were indicted April 1953. It was charged that they did unlawfully receive, onceal and store four paintings of the value of more than 5,000.00, which paintings were moving as, and which were part of, and constituted interstate commerce, they know- g the same to have been stolen; in violation of Title 18 . S. C. Section 2315 (R. 3). The defendant, Joseph De- ietro, was found not guilty and petitioner was found uilty by verdict of a jury (R. 300). Petitioner was sen- enced by the United States District Court for the North- rn District of Illinois to imprisonment for six years (R. 08).

The United States Court of Appeals for the Seventh ircuit affirmed the conviction and denied rehearing (App. A. R.).

Four paintings were removed from the St. Joseph's ld Cathedral at Bardstown, Kentucky, the morning of ovember 13, 1952 (R. 26-45). On April 3, 1953, petitioner nd a man known to him as Gus Manoletti (who testified at ie trial of this cause under the name of Jean Pierre aFitte) were arrested by agents of the Federal Bureau

of Investigation in a parking lot located across from the Drake Hotel in Chicago, Illinois; the paintings were discovered in the automobile in which they arrived (Tr. 636-7, 62).

The sequence of events leading up to this arrest, so far as it appears from the record, depends almost wholly on the testimony of the witness Jean Pierre LaFitte and the petitioner, Norton I. Kretske.

LaFitte testified that he was a Special Investigator for the Federal Bureau of Narcotics. He further testified as to having been employed by the Federal Government in various investigative capacities, both in this country and abroad, for a period of about sixteen years (R. 45-46, 65-66). During the first week of November, 1952, he was assigned to investigate the disappearance of these paintings by the Federal Bureau of Investigation (R. 48, 69). LaFitte testified that on Wednesday, April 1, 1953, while he was in New York, he received a telephone call at Axtel 7-1647 from Chicago; he later identified the voice of the person with whom he talked as that of the petitioner (R. 47-49). As a result, LaFitte testified, he agreed to come to Chicago to see some paintings. LaFitte proceeded to Chicago, reporting to the FBI who had reserved a room for him at the Drake Hotel (R. 48-49).

On April 2, 1953, Petitioner, accompanied by a man known to LaFitte as "Mark", met LaFitte in the lobby of the Drake Hotel.

Petitioner and the witness, according to the latter, then went to a Chicago night club. There, according to the witness, petitioner told him that he had the paintings about which someone had talked to the witness, for disposal. According to the witness, petitioner said, in response to a query as to whether there was any blood on the picture, "No, my boy got the picture—cut the picture from the

frame, and the job he done in a safe way, and nobody be hung".

On April 3rd, the three men drove to a small home where the paintings were and the witness and petitioner examined them. The party returned to the hotel where the third man, "Mark", remained in the lobby while the witness and petitioner went to the witness' room and discussed price. Petitioner and the witness agreed on a price of $40,000 and petitioner asked the witness to rent a big Cadillac. In the late afternoon, they went to the home which they had previously visited, picked upon the paintings and returned to a parking lot where they were arrested (R. 45-98).

The petitioner testified that he was an attorney, licensed to practice in the State of Illinois since 1929. In 1941 he was convicted of a felony in the Northern District of Illinois and was sentenced to 14 months (R. 606, 607). He testified that he was acquainted with an art dealer named Mark Ratner (R. 607).

On the morning of April 1, 1953, Ratner called Kretske and told him that he had some pictures which he wanted Kretske to store for him (R. 608). Kretske made arrangements to store them with his co-defendant, DePietro, and, at noon on April 1st, met Ratner at the Bismarck Hotel in Chicago. At this time, Ratner went to a telephone attendant to whom Kretske heard Ratner give an Axtel number. When the call was put through he heard Ratner say, "Max, when you come in, I am all ready for you." Then Ratner told Kretske that Max Winston, a New York art dealer with whom he had done business for more than 30 years, was coming out tomorrow or the next day to look at his paintings. After this occurrence, Kretske drove the paintings, of which he had only seen the exterior, to DePietro's home where he left them.

On April 2, 1953, Ratner received a telephone call at Kretske's office. After conversing on the telephone, he told Kretske that his friend was in Chicago at the Drake Hotel, and asked Kretske to accompany him there as his attorney. Upon arriving at the Drake at about 4:30 P. M., Ratner made a call on the house telephone and shortly thereafter a man came up to them and introduced himself as Gus Manoletti. Upon inquiry by Ratner, he explained that Max was unable to come to Chicago. Then Ratner introduced the petitioner as his lawyer, and the three of them went to the Cape Cod Room.

Thereafter, the three of them went to DePietro's home to inspect the paintings, this being the first time that petitioner had seen them unrolled. En route to the hotel after examining the paintings Mark told Kretske that Gus wanted to take the paintings to New York for Max to examine, and Kretske advised against this. Gus said that he would get a car and bring the paintings to the hotel; Ratner then stayed at the hotel while Gus and Kretske picked up the paintings and drove to the parking lot where they were arrested.

On trial, Kretske denied having ever heard of LaFitte or Manoletti prior to April 2, 1953, having given Gus his business or home telephone number, and practically all of the other statements made by the witness, LaFitte (R. 606-677).

Upon cross-examination of LaFitte, petitioner's counsel attempted to inquire into the previous activities of the witness LaFitte for the United States of America; an objection to this line of examination was sustained, based on the assertion of the United States' Attorney that the witness's activities on behalf of the government should not be disclosed "in the public interest" (R. 86).

After trial, a motion for new trial on the grounds of

newly discovered evidence was filed by the petitioner, based on the affidavit of one, Robert W. Heinze. In this affidavit, Mr. Heinze stated that he was an attorney associated with counsel for the petitioner and was present in the courtroom at the time the witness LaFitte testified. Thereafter, petitioner's counsel read the report of the opinion in the case of *United States* v. *Sansone*, 206 F. 2d 86 which indicated that a man named LaFitte had been an informer in that case. Thereafter, Mr. Heinze went to New York and examined the record in that case which was docketed in the United States Court of Appeals for the Second Circuit as No. 22725; during this same trip, he saw a photograph of the LaFitte who was involved in the *Sansone* case and identified him as the same LaFitte who had testified in the instant case.

From the record in the *Sansone* case, in which LaFitte had testified, Mr. Heinze learned, and so stated in his affidavit, that LaFitte had testified to having been a painter prior to his employment by the Bureau of Narcotics. He further learned that LaFitte had been incarcerated at Ellis Island from April 3, 1951 to May 29, 1951 under a deportation warrant on which he had been arrested some four or five years prior. The record in that case further showed that LaFitte had also testified that he had not been employed by the government until after he was released from Ellis Island on bail and paroled to the Immigration Department. The record also showed that at various times he had used four different aliases other than LaFitte or Manoletti. Between 1921 and 1934 he served with the Foreign Legion, and then returned to France, residing there until 1936 when he came to the United States without a passport. During his period in the United States, he testified to having been engaged in various activities including painting, managing a restaurant and operating a pen company. The record also showed

that he was deported from the United States in 1921 for the commission of a crime in New York during that year and had been denied permission to re-enter the country. The record likewise contained a reference to a "Prisoner's Criminal Record" from the New York Police Department, showing a conviction of petty larceny in New York and various subsequent convictions in European countries. Finally, it appeared from the Court of Appeals record that the Federal Bureau of Investigation has a file on the criminal activities of the witness, LaFitte, which bears file Number 1,521,225 (R. 810-836).

During the hearing on the petition for a new trial, supported by Mr. Heinze's affidavit, Mr. Daniel P. Ward, the Assistant United States' Attorney who conducted the above entitled cause for the Government, testified, under oath, that he was advised by the FBI that there was no evidence that LaFitte had a criminal record; he further testified that his objection to the cross-examination of LaFitte was based upon LaFitte's statement to him, after Ward asked him what he had done in Europe for the Government, that he had been instructed by his superiors in Washington not to disclose the nature and extent of his work for the Government; Ward further testified that he did not know that LaFitte had committed perjury at petitioner's trial (R. 789-790).

The statute under which petitioner was indicted required that the alleged stolen merchandise have a value of at least $5,000.00. The value of the paintings constituted one of the central issues in the trial, and was, in fact, jurisdictional. The greatest portion of the testimony as to value centered around a 17th Century painting by Mattia Preti.

The government's witnesses, Donahue (R. 164-268) Tarrant (R. 271-292), Malone (R. 292-333), and Sweet (R. 333-381), testified to varying values as well as an offer of

sale of a Preti painting. Defendant's experts, Tozzi (399-485), Stanton (R. 485-541) and Grant (588-607), likewise testified as to values; that the paintings had a market value of about $100.00 each, because of the terrible condition of the paintings. Only one actual sale of a painting by Preti was introduced in evidence; the defendant's witness, Tozzi, testified that in 1951 he bought a Preti for approximately $1,800.00, which was far less than the values estimated by the Government's experts. Despite this evidence, the court refused petitioner's requested instructions that a bona fide sale was the best evidence of value and that an offer to sell, without an actual sale, was no evidence of value (R. 709-712; 792-793).

The court likewise instructed the jury that, under the statutes, one who aids and abets the commission of an offense against the United States is equally guilty with the person committing the offense, and followed this by an instruction that an attorney who knowingly aids and abets the commission of a crime by a client is equally guilty with the client (R. 749-750; 799).

The petitioner's defense was that he represented Mark Ratner as the latter's attorney in the sale of the paintings of LaFitte. There was no evidence whatever that Mark Ratner had committed a crime.

During the course of trial, the trial judge made remarks which were extremely critical of the truthfulness of petitioner's witness, Tozzi (R. 424-425). These remarks, although made outside the presence of the jury, were reported in the Chicago Daily Tribune on the following morning (R. 451-453). After asserting that this story would prejudice the jury, Mr. Gladstone read the article into the record and moved that the jury be asked if they had read the article. This motion was denied (R. 453-454).

REASONS FOR ALLOWANCE OF THE WRIT.

I.

Aside from the evidence with respect to the market value of the stolen paintings, a jurisdictional question, the most important factual question presented to the jury was the relative credibility of the Government's principal witness, LaFitte, and the defendant, Kretske. The petition for a new trial on the ground of newly discovered evidence, which was totally uncontradicted by the Government, disclosed that LaFitte was not in the employ of the United States Government abroad for thirteen or fourteen years prior to taking the witness stand against the petitioner. On the other hand it appears that he was held for deportation by this country and had been paroled to the Immigration Department, as disclosed in the *Sansone* case, "the better to act as an informer." He misled and lied to the prosecuting attorney who testified under oath, on the hearing of petitioner's motion for a new trial on the ground of newly discovered evidence, that LaFitte told him he was directed by his superiors in Washington not to disclose the nature of the confidential work he had performed for the United States.

It does appear that LaFitte made a false statement to the prosecuting attorney and as a result thereof the prosecutor objected to cross-examination of LaFitte as to the work he had done in Europe. LaFitte had testified on direct examination that he had worked for the United States Government in Europe for several years rendering investigative services for the Federal Bureau of Narcotics (R. 46). On cross-examination LaFitte testified that he was a special investigator and when asked "with what department" the prosecuting attorney objected saying "it is a matter of public interest in which there are certain

matters which should not be disclosed." The objection was sustained (R. 86). On further cross-examination the following took place (R. 86):

"By Mr. Gladstone:

"Q. You were in Europe on investigations by the Government?

"By Mr. Ward: Objection, your Honor, again. It is a question of public interest.

"By the Court: Sustained.

"By Mr. Ward: He testified to that in chief, and anything further should not be disclosed, it is a matter of public interest.

"By the Court: Sustained."

As a result of barring cross-examination of LaFitte as to his antecedent, the Government was enabled to place LaFitte in a position where, on closing argument, it could say:

> "We think he (LaFitte) illustrated for you very graphically the skill, the ingenuity, the resourcefulness that has become part of the tradition of the Bureau of Investigation. For the past three years he has been conducting investigations for the Federal Bureau of Narcotics, and for 10 years preceding the beginning of his work with the Federal Bureau of Narcotics he had been employed by his Government in investigative capacities abroad" (R. 722).

It is impossible to speculate how much of the information subsequently discovered in the case of *United States v. Sansone*, 206 F. (2d) 86, might have come to light had defendant not been thwarted in his attempt to probe the background of LaFitte by the latter's self-created claim of public interest in the nondisclosure of his alleged investigative activities which he foisted upon the Assistant United States Attorney. Nor is the Federal Bureau of Investigation blameless in this respect for, upon the hearing of the motion for new trial, it offered no evidence to

impeach the affidavit of Mr. Heinze that it actually had File No. 1,521,225 containing a record of LaFitte's activities. By holding that the limitations to be placed upon cross-examination are within the discretion of the judge in this instance, where no cross-examination was in fact permitted, the Court of Appeals for the Seventh Circuit has condoned the raising of a man of questionable character to the dignity of a respected law enforcement officer, and denied petitioner his right to have the background of the witness fully presented to the jury. In this respect, the holding of the Court of Appeals is in direct conflict with the holding of *Hartzell* v. *United States*, 72 F. (2d) 569, 585, that a denial of full and fair cross-examination is usually prejudicial error, and the statement of this Court in *Alford* v. *United States*, 282 U. S. 687, 691, that cross-examination may properly explore the antecedents and background of the witness for purpose of showing facts which tend to affect his credibility.

Moreover, the Court of Appeals has ruled that the trial court did not abuse its discretion in sustaining the Government's objection to cross-examination as to LaFitte's investigative activities on the grounds of the public interest, in their nondisclosure. The only question which faced the trial court on this objection was a question of law; could the Government urge this objection with respect to the cross-examination of a witness they themselves had tendered? In holding that the trial court did not abuse its discretion, the Court of Appeals has merely held that the trial court's decision on this question of law was correct.

Whatever privilege may have justified the suppressing of evidence of LaFitte's activities, it dissolved and disappeared when he was placed on the witness stand, and the holding by the Court of Appeals that the trial court

ruled correctly in barring cross-examination on this question, is in conflict with the principle announced in *United States* v. *Andolschek*, 142 F. 2d 503, 506, and *United States v. Beekman*, 155 F. 2d 580, 584, that, by instituting proceedings in which privileged documents become important, the Government waives the privilege. By the same line of reasoning, when the Government tenders a witness, the disclosures of whose activities might otherwise be privileged, it waives that privilege.

In addition the Court of Appeals held that the attempted cross-examination of LaFitte as to his prior activities were outside the scope of his examination in chief and, therefore, petitioner should have called LaFitte as its own witness.

As may be noted from the foregoing reference to the record, LaFitte *did* testify that he worked for the Government in Europe for thirteen years, and the Court of Appeals was in error in stating that the cross-examination of LaFitte on this matter was not permissible because it was not brought out on direct examination. However, the holding of the Court of Appeals that petitioner should have called LaFitte as his own witness, conflicts with the decision of the Ninth Circuit in *Carter Products* v. *Federal Trade Commission*, 201 F. 2d 446, 452, where it was held that a requirement that a party adopt an adversary witness to establish facts which could properly be established by full cross-examination was flagrant error.

In addition to its importance to petitioner, the holding of the Court of Appeals presents a question of general importance for the administration of justice in the Federal Courts on which this Court, in the exercise of its supervisory power, should pass. It is axiomatic that the informer is one of the principal sources of information in criminal investigations; yet it is also equally true that

the reliability of an informer is always questionable. This is particularly true where, as here, the informer has a long record of crimes and deceptions which indicate an inveterate propensity for prevarication.

Full cross-examination of LaFitte may have disclosed a motive for his prevarication; no doubt he desired to postpone his deportation as long as possible. A further matter that should be passed upon by this Court in the exercise of its supervisory power is whether a witness for the Government, such as one of LaFitte's character, should be permitted to make a false statement to the prosecuting attorney, which induces the prosecutor to believe that the witness is a person of integrity and reputation and present him and hold him up as such to the Court and the jury.

II.

In avoiding the clear error in the refusal of the defendant's instructions on value (Cf. *United States* v. *Dilman*, 146 F. 2d 572, 575; *The Blandon*, 39 F. 2d 933, 934, aff'd. 42 F. 2d 1013) and in the giving of the instructions concerning aiders and abettors (Cf. *United States* v. *Horton*, 180 F. 2d 427, 430; *Colosacco* v. *United States*, 196 F. 2d 165, 167, and *Morei* v. *United States*, 127 F. 2d 827), the Court of Appeals held that the issues were not presented because of failure to comply with Rule 30 of the Federal Rules of Criminal Procedure. The record in this case shows that, prior to argument, the trial court reviewed his proposed charge with counsel in chambers (R. 701, *et seq.*). At pages 706 through 707 of the record, the aiding and abetting instructions were discussed, Mr. Gladstone specifically objecting to them on the grounds that there is no evidence that Kretske aided or abetted his client in the commission of a crime. Mr. Gladstone's objections to the Court's actions concerning the value instruction appear at R. 708-713.

It is obvious from the foregoing that the court and counsel for all parties understood that they were recording the objections to the charge at this time; it is likewise clear that the purpose of Rule 30 was served since the trial judge was fully advised of counsel's views regarding the charge before it was even given, much less merely before the jury retired. At the time of trial, the rule on this situation for the Seventh Circuit was contained in the case of *United States* v. *Balodimas*, 177 F. 2d 485, 488, where the court said:

> "The record shows that the court informed counsel that he was going to give the instruction in controversy in place of the one proposed and that counsel might have an exception, which was noted. This may not be a strict compliance with the rule, but it is not easy to discern what more counsel for the defendant could have done under the circumstances. Moreover, in our view, the error in this instruction affects the substantial rights of the defendant which we are obligated under Rule 52 of the Rules of Criminal Procedure to notice."

The issue of compliance with Rule 30 arises periodically but this Court has never explicitly exercised its regulatory power to explain this issue. Certainly, the presence of Rule 52(b) indicates a sound basis for adopting the view set forth in the *Balodimas* case, and the abandonment of the doctrine in that case without warning by the Court of Appeals for the Seventh Circuit works a manifest injustice. Likewise, the abandonment of the *Balodimas* doctrine creates a clear conflict with the decision of the Ninth Circuit in *Remmer* v. *United States*, 205 F. 2d 277, footnote 16, where the court holds that the making of objection after the court informs counsel of his proposed charge, but prior to its delivery, serves the purpose of the rule and is understood by counsel and the court to satisfy the rule, it does not constitute a waiver.

As this Court well knows, the trial judge's charge, from the jury's point of view, is the pinnacle of the whole case; from it, they learn the legal significance of the facts which they have heard during the presentation of the evidence. It is, therefore, important to a defendant that such charge be correct, but, on the other hand, to avoid post mortem reasoning, Rule 30 was adopted, limiting the defendant to those errors which his counsel observes at the time the charge is given. If the Federal courts are to continue applying such a limitation, it is important that counsel know precisely what constitutes compliance with the rule. Certainly, this Court should, in the exercise of its supervisory power, take advantage of the opportunity presented by this case to examine the question fully, adopt the rule of the *Remmer* and *Balodimas* cases as being the only proper interpretation of Rule 30, and clear up the uncertainty created in the Seventh Circuit by the coexistence of the decision in this case and the *Balodimas* case, and in all circuits by the conflict between this opinion and the *Remmer* case. Certainly, where full objections have been made to the Court prior to instructing the jury, Rule 30 should not be construed as making it mandatory to repeat the objections after the charge is given and before the jury retires. At least the requirement that objections be made *before* the jury retires, has been fully met under the foregoing circumstances.

III:

Title 18 U. S. C. Section 2315, requires that the value of the merchandise alleged to have been stolen must be in excess of $5,000.00. Proof of this value must be made beyond a reasonable doubt in order to sustain a conviction, since it is jurisdictional.

Section 2311 of said title defines value, as used in the

said Section 2315, as "the face, par, or market value, whichever is the greatest." Since the paintings alleged to have been stolen had no face or par value, it was incumbent upon the Government to prove the market value thereof. The principal witness of the Government testifying to value was Kenneth Donahue. He placed a valuation on Government Exhibit 1, "The Immaculate Conception," from $25.00 to $50.00. The market value of Government's Exhibit 2, "The Descent of the Holy Ghost" was $900.00, because of the artistic quality of the painting and the historical value (R. 172); Government Exhibit 3, "The Crowning of the Blessed Mary" was $1500.00 because of its artistic quality and its historical association (R. 173).

He placed a "combined" market value of $7,500.00 on Government Exhibit 4, "The Flaying of St. Bartholomew," based upon the following: (1) that it is a Baroque painting; (2) that it was done by a known artist; (3) that it was a gift of Francis I, King of the Two Sicilies; (4) that it is part of Americana; and (5) that another painting by the same artist is offered for sale at $6,000.00 (R. 196). A motion was made to strike the testimony of the witness with respect to the said offer for sale of a painting at $6,000.00, but the same was denied (R. 196, 197). No evidence of actual market value or of a sale of similar paintings were introduced by the Government.

Government witness, Donahue, testified further that where a painting by Preti, the artist who painted "The Flaying of St. Bartholomew," is not listed currently, the value is sought from a sale of a painting by a contemporary artist of the same reputation, a painting of about the same size, the same number of figures, and the same quality, and that is used as a guide to the present approximate market value among art dealers, auctioneers, and galleries, as to a painting like Government's Exhibit 4 (R. 246).

The petitioner introduced evidence by the owner of the Preti painting, alleged to have been offered at $6,000.00, that he had actually purchased the said painting in Rome in 1951 for $1500.00; the cost of shipment, taxes and other expenses amounted to an additional $200.00 to $300.00; thus there was actual evidence of an actual sale of a Preti painting for a total of about $1800.00 (R. 400, 401).

The Court of Appeals for the Seventh Circuit, in its opinion, relied upon the offer of a Preti painting for $6,000.00, as evidence of value. This holding is in conflict with the decisions in the Fifth Circuit in the case of *United States* v. *Dillman*, 146 F. 2d 572, 575, and in the case of *Atlantic Coastline R. Co.* v. *U. S.*, 132 F. 2d 969, 963, and with the Supreme Court decision in *Sharp* v. *United States*, 191 U. S. 341, 348, 24 S. Ct. 114, 48 L. Ed. 211. All of the latter cases hold that an offer to sell, without a sale being consummated should be rejected.

The Court of Appeals approved the trial court's denial of a tendered instruction that what an article sold for in a bona fide transaction is the best evidence of value.

In approving the denial of this tendered instruction, the Court of Appeals was at variance with an applicable decision of the United States Supreme Court, *Albert Dumois*, 177 U. S. 240, 255, 20 S. Ct. 595, 44 L. Ed. 751, holding that testimony of a sale is better evidence than the *opinions* of experts.

Since the Court of Appeals approved testimony of value, which failed to come within the statutory definition that "value" means "market value," this Court should exercise its supervisory power to clarify the definition of "market value" as used in the statute under discussion, to the end that all Circuit Courts of Appeals may apply a clear and uniform formula in determining whether proof of value introduced in a case comes within the statutory definition of "value."

IV.

Petitioner's defense to the indictment was that he represented one, Mark Ratner, as the latter's attorney in the possession and sale of the stolen paintings.

Entirely on the trial court's own initiative, he gave the following instruction to the jury:

> "An attorney who knowingly aids, abets, counsels, commands, induces or procures the commission of a crime against the United States by his client is equally guilty with his client."

Objection was made in chambers to the giving of this instruction (R. 705-707). The petitioner testified that the first he knew the paintings were stolen was when he was arrested (R. 644). There is no evidence that Mark Ratner had committed a crime or that he knew the paintings were stolen. Ratner had not been indicted as a principal; the petitioner was indicted as a principal, and not as an aider or abettor. This instruction had the effect of destroying the entire defense of the petitioner and was equivalent to a directed verdict against petitioner. The instruction amounted to depriving the petitioner of due process of law and this Court should exercise its supervisory powers to correct this prejudicial error, since the Court of Appeals merely noted, without setting forth the instruction, that there was no sound basis for objecting to this instruction.

V.

After the petitioner first went on the stand to testify he was asked whether he had ever been convicted of felony and he replied that he was in 1941 in the Northern District of Illinois and was sentenced to 14 months. At the time of his testimony, he was licensed to practice in the State of Illinois (R. 606, 607).

The petitioner further testified that he represented one Mark Ratner as the latter's attorney (R. 614) and that he represented Mark Ratner as the latter's attorney in the sale of the paintings.

Ratner was on probation and the petitioner represented him in connection therewith (R. 615, 651).

On cross-examination the prosecutor asked the petitioner whether the rules of probation permit a man who was on probation to associate with a man who is an ex-convict and the objection to the question was sustained and the jury instructed to disregard the question (R. 652). Notwithstanding the ruling of the Court, the prosecutor, during his address to the jury in referring to the petitioner's arrest, said, "Kretske was shocked; he had been convicted before; he had been disbarred before; he had been publicly shamed and humiliated" (R. 732).

Continuing further in his arguments to the jury, the prosecutor said, "Kretske said that he had been in trouble before; Kretske said that he had been convicted of felony and he was. This departure from virtue is therefore not so surprising" (R. 742). On objection the remark was stricken and the Court stated to the jury that evidence of the conviction of felony was to be considered only upon the question of the veracity of the witness.

The Court of Appeals held that these remarks were not prejudicial and in so doing, was in conflict with the case of *Pierce* v. *United States* (Cir. 6) 86 F. (2d) 949, 952, condemning a studied effort to injecting into the case prejudicial matter for the purpose of influencing the verdict and its continued repetition after adverse rulings. This misconduct on the part of the prosecuting attorney was condemned by this Court in the case of *Berger* v. *United States*, 295 U. S. 78, 88-89, 55 S. Ct. 629, 633-634, 79 L. Ed. 1314.

VI.

Piero Tozzi was an expert witness for the petitioner on the question of value. During his examination, the trial judge appeared to have been dissatisfied with some of Mr. Tozzi's testimony and he took over the examination of Mr. Tozzi out of the presence of the jury. Objection was made to the manner of the judge's questioning and the raising of his voice and the trial judge then said, "I don't think that man is telling the truth, that is the reason I am questioning him" (R. 424). The following morning the Chicago Tribune, a newspaper of wide circulation published in the City of Chicago, printed a highly prejudicial article, repeating what the Judge had said, "I don't think that man is telling the truth." It further cited that the trial court gave Mr. Tozzi a tongue lashing for applying saliva to one of the paintings in an effort to clean some of the dirt on it. Petitioner's attorney read the article into the record (R. 451-453) and asked that the jurors be polled whether they had read the article. This motion was denied (R. 454).

Since the credibility and integrity for truth of Mr. Tozzi was an important factor to be determined by the jury, because he contradicted the Government experts on value and other matters, it might well have been that any juror having read the article would be prejudiced against Mr. Tozzi as a witness.

The Court of Appeals did not rule on the assignment of the foregoing error, merely holding that other errors had been assigned but they were without merit.

Under a similar situation, in the case of *Meyer* v. *Calwalader,* 49 F. 32, 36, the Court held that it is incredible that jurors going out into the community after each session of the court did not read prejudicial newspaper articles

with reference to matter arising during the trial. The holding of the Court of Appeals for the Seventh Circuit is wholly contrary to its previous decisions in the case of *Bucher* v. *Krause*, 200 F. (2d) 576, 584, citing *United States* v. *Caruthers* (7th Cir.) 152 F. (2d) 512, 519, where the Seventh Circuit said:

> "Before this Court can conclude that prejudicial error occurred, it must be shown that prejudicial matter was communicated to the Jury."

In both the *Krause* and *Carruthers* cases, the defendants were offered the opportunity to learn the facts by interrogation of the jurors.

This Court should use its supervisory powers to clarify the conflicting decisions of the Court of Appeals for the Seventh Circuit so that defendants in the future may know the correct procedure to determine whether jurors have read and been prejudiced by inflammatory articles appearing in newspapers.

Conclusion.

For the foregoing reasons, this Petition for Writ of Certiorari should be g anted.

Respectfully submitted,

MYER H. GLADSTONE,
Attorney for Petitioner.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11065. OCTOBER TERM, 1954, JANUARY SESSION, 1955.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
NORTON I. KRETSKE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 18, 1955.

Before DUFFY, *Chief Judge,* FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

DUFFY, *Chief Judge.* Appellant was tried before a jury and convicted on the charge of violation of Title 18, U. S. C. § 2315.[1] The indictment charged appellant Kretske did receive, conceal and store certain goods, wares and merchandise of the value of more than $5,000 which were a part of and constituted interstate commerce, knowing the same to have been stolen. The goods, wares and merchandise were four paintings that had hung for a century or

1. "Sec. 2315. Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, * * * which constitute interstate or foreign commerce, knowing the same to have been stolen, * * *

* * * * *

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

more on the walls of St. Joseph's Old Cathedral, Bardstown, Kentucky.

The evidence established that during the night, November 12-13, 1952, nine paintings were stolen from St. Joseph's Old Cathedral, Bardstown, Kentucky. During the burglary the paintings were cut from their frames. The exhibit numbers in the trial below and the names of the paintings were: Exhibit 1—The Immaculate Conception; Exhibit 2—The Descent of the Holy Ghost; Exhibit 3—The Crowning of the Blessed Virgin Mary; and Exhibit 4—The Flaying of Saint Bartholomew.

Although defendant alleges numerous errors, he devotes much time and effort to his contention that the government did not prove the paintings had the jurisdictional value of $5,000, and that the trial court admitted prejudicial evidence on the question of value.

Exhibit 1, painted about 1850 by a Bardstown artist, was admittedly, of little value. But a decided difference of opinion as to the value of Exhibits 2, 3 and 4 was expressed by witnesses for the government and those offered by the defendant. It was shown by tradition and reputation and from records in the Cathedral these three paintings, together with some others not involved in this case, were gifts to the Cathedral in the early 1800s by Louis Philippe, King of the French, and Francis the First, King of the two Sicilies and Naples. For many years prior to the theft of the paintings inscriptions appeared immediately beneath the paintings informing the public that the paintings were gifts from the two kings mentioned. It was admitted that none of the paintings had ever been sold. Credible testimony was received that Exhibit 4, The Flaying of Saint Bartholomew, was the work of the well-known Italian artist, Mattia Preti.

When defendant was endeavoring to sell the four paintings to the F. B. I. under-cover man, Lafitte, who posed

a prospective purchaser of stolen paintings, Kretske ace a value of $100,000 on the four paintings. After nsiderable negotiation Kretske agreed to a sale for 0,000. At the trial he offered testimony that the paint-gs were of little or, at least, insignificant value.

We think the government adopted a proper method of stablishing the value of these four paintings. It produced n impressive array of art experts who testified as to the rtistic merits of the paintings and who gave their opinions s to the price these paintings would bring if they were ffered for sale. Of course, different paintings by a single rtist may vary in artistic excellence although creations y the Old Masters or other well-known artists whose work s consistently and usually of high merit, would ordinarily ave a higher sale price than a similar painting executed y an unknown artist. Therefore, the government quite roperly solicited the opinions of highly qualified art xperts.

The following witnesses testified for the government as o the value of the paintings: Kenneth Donahue, who had een associated with the Frick Art Collection in New York nd the Museum of Modern Art in New York. He was here as a lecturer and research assistant in the history of rt, especially in 17th Century paintings. At the time of he trial, he was curator of the famous Ringling Museum t Sarasota, Florida, and by chance, had been familiar with the paintings, Exhibits 1, 2, 3 and 4, since childhood. Irving S. Tarrant, an art appraiser, is a special curator at the Art Institute in Chicago. He has been in the Fine Arts filed since 1928. For many years he was employed by the American Appraisal Company with particular reference to the appraisal of fine arts. He knew of a Preti painting being offered for sale in New York for $6,000.. Patrick Thomas Malone is an assistant curator of the Art Insti-

tute at Chicago. His special field of interest was 17th and 18th Century Italian paintings. He has studied art abroad and on his most recent trip to Europe examined twenty to thirty paintings by Mattia Preti. Frederick Arnold Sweet is a curator of the Art Institute of Chicago. He was former director of the Art Museum in Portland, Oregon, and Curator of Renaissance Art at the Brooklyn Museum in New York. He made eight trips abroad in his study of art. Each of these experts testified that the paintings in question were of a value in excess of $5,000. On this appeal we must consider the evidence most favorable to the government. Clearly the jury was entitled to find that the value of the four paintings together was in excess of $5,000. Defendant's claim of error on the question of value of the paintings is entirely without merit.

Defendant asserts prejudicial error because of claimed undue restrictions in the cross-examination of government witnesses, Jean Lafitte, Gene M. Norris and Francis J. Stefenak. We find similar objections on most of the appeals to this Court in criminal cases irrespective of the district judge who presided at the trial. It may, therefore, be appropriate to briefly state once more the applicable legal principles.

This question was discussed by this Court in *United States* v. *Lawinski*, 195 F. 2d 1. We pointed out that the precise extent of permitted cross-examination cannot be stated rigidly but that, (p. 7) "* * * It is for the presiding judge to exercise a wise discretion in determining whether, considering the examination in chief, it is fit and proper that the questions presented be permitted or excluded. *Storn* v. *United States*, 94 U. S. 76. All the decisions agree that the latitude allowed should be great enough to subserve the ends of justice; but once fixed by the trial court it can not be deemed erroneous except where

it is clear that the discretion has been abused, even though the discretion is necessarily vague in extent.

• • • • •

"The trial judge is in the best position to determine how far the cross-examination should proceed, and, when convinced that the facts are all presented and fairly before the jury, the examination of a witness, either on direct or cross-examination, should cease." Other pertinent comment in decisions by this Court appear in *United States* v. *Glasser, et al.*, 116 F. 2d 690, 702; *United States* v. *Hornstein*, 176 F. 2d 217, 220; *United States* v. *Lutwak*, 195 F. 2d 748, 755.

For more than 100 years the rule in the Federal Courts has been that the scope of cross-examination is limited to subject matter referred to during the examination in chief and if a person wishes to examine a witness regarding other matters he must do so by making the witness his own. *Bell* v. *United States*, 4 Cir., 185 F. 2d 302, 310. Defendant's main complaint with reference to limitations of cross-examination pertains to the witness Lafitte. An examination of the record discloses that defendant's counsel was permitted to inquire with great particularity into his conversations and his transactions with Kretske. The instances where the Court limited the proposed cross-examination were on collateral matters which were beyond the scope of the direct examination and, indeed, in most instances, not relevant to the proceedings. Defendant could have called Lafitte as his own witness or might have requested the Court to call him as the Court's witness but he did neither. We hold there was no prejudicial error because of the restriction in the cross-examination of the witness Lafitte, Norris and Stefenak.

Appellant asserts error because of the denial of his motion to vacate the judgment of conviction. Appellant

claims that newly discovered evidence would disclose that Lafitte testified falsely and that the prosecuting officers knew or should have known of such perjury.

On direct examination Lafitte testified that he was a special investigator for the Federal Bureau of Narcotics and had been so employed for about three years. He also testified that he had worked for the Federal Bureau of Investigation in New York on the paintings case.[2] Appellant complains that the Court would not permit his counsel to cross-examine Lafitte about various past activities and that at one point the Court sustained a question on cross-examination on the government's objection, "It is a matter of public interest in which there are certain matters that should not be disclosed." Appellant now claims that it can produce evidence of a criminal record by Lafitte apparently dating back a number of years.

It is understandable why appellant makes such a bitter attack upon Lafitte. Acting under instructions of the F. B. I. he fooled Kretske completely. After the sale price of $40,000 had been agreed upon, Kretske led him to the place in Chicago where the paintings were being kept and exhibited same to Lafitte. It was also Lafitte who gave the pre-arranged signal to the F. B. I. which led to the seizure of the stolen paintings in the possession of the appellant.

Appellant contends that the newly discovered evidence would affect the credibility of Lafitte. But new trials are not ordinarily granted where the newly discovered evidence is merely of an impeaching character. *Slappey* v. *United States,* 5 Cir., 110 F. 2d 528.

In *Gage* v. *United States,* 9 Cir., 167 F. 2d 122, 125, in support of a motion for a new trial, appellant furnished an affidavit to the effect that the principal government wit-

2. Lafitte was in New York when Kretske first called him from Chicago by long distance telephone and spoke to him about the paintings.

ness had twice been convicted of theft. The court there said: "* * * The mere discovery of additional impeaching evidence does not meet the requisites for a new trial." In *Lawrence* v. *United States*, D. C. Cir., 196 F. 2d 48, the court held there was no error by the trial court in denying a motion for a new trial based on the discovery that a prosecution witness had a criminal record.

It is fundamental that in a motion for a new trial on the grounds of newly discovered evidence, there must be a showing that the evidence is not merely cumulative or impeaching; that it must be material to the issues involved; and it must be such that on a new trial the newly discovered evidence would probably produce an acquittal. We hold that, in the instant case, there was no abuse of discretion in denying appellant's motion for a new trial on the ground of newly discovered evidence.

We have carefully examined appellant's claims (1) that the Assistant United States Attorney made prejudicial statements to the jury, and (2) that remarks of the court in the presence of the jury during the trial were prejudicial. Appellant asserts that the statements complained of were of such a nature as to require a reversal of the judgment of conviction. We hold that these objections are without merit and cannot be sustained. We find no prejudicial error in this respect.

Appellant asserts error because of instructions given by the Court and also because the Court refused to give instructions tendered by appellant. We doubt that there was any sound basis for such objections, but in any event we think the objections were waived. Rule 30 Federal Rules of Criminal Procedure, 18 U. S. C. A. provides in part: " * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stat-

ing distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." Appellant made no objection at the conclusion of the charge to the jury and thus did not comply with Rule 30. In *United States* v. *Sutter*, 160 F. 2d 754, 757, this Court said: "No question is presented as to the instructions as it is not shown that before the jury retired the defendant objected to the refusal to give the instructions he requested, stating distinctly the matter to which he objected and the grounds of his objection, as required by Rule 30 of the Federal Rules of Criminal Procedure, * * *."

It appears that the proposed instructions were considered at a conference in chambers between the attorneys for the parties and the trial judge sometime during the course of the trial. However, any objections or suggestions there made would not be a compliance with Rule 30. When it came time to give the instructions, the court would not know whether the previous objections or suggestions were still being urged. We think it would be a substantial compliance with Rule 30 if, after the instructions were given, counsel made specific reference to his previous suggestions or objections, and that he was still insisting thereon. This was substantially the plan worked out by the trial court and approved by the Court of Appeals in the *Las Vegas Merchant Plumbers Ass'n.* v. *United States*, 210 F. 2d 732, 744.

Defendant obliquely refers to the question of whether the paintings had ceased to be in interstate commerce before coming into his possession. This question was not raised in defendant's statement of points. It was not listed as a contested issue on this appeal nor urged as a ground for reversal. However, defendant did contend that the Court erred in excluding the testimony of a telephone

company's supervisor that seven long distance calls were placed between March 12, 1953 and March 26, 1953 at Kretske's office for the residence of Mrs. David Lentz in Joliet, Illinois. Defendant urged that this testimony would somehow prove that the paintings had reached the end of their interstate journey before defendant obtained possession of the same.

Defendant had testified that Mark Rattner had made a number of telephone calls from defendant's office to Mrs. Lentz in Joliet, Illinois, but the supervisor had no knowledge of the subject matter of any of the telephone conversations. Whether certain 'phone calls were or were not made was no evidence as to whether the paintings in evidence were or were not in interstate commerce. Defendant made no effort to produce the testimony of Rattner or of Mrs. Lentz. We think that the Court properly excluded the testimony of the telephone supervisor.

We have considered the other questions which defendant has urged for reversal but to which we have not specifically referred. We deem them to be without merit. As we find no reversible error in this record, the judgment of conviction is

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Friday, April 22, 1955.

Before:

Hon. F. Ryan Duffy, Chief Judge,
Hon. Philip J. Finnegan, Circuit Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge.

The United States of America, *Plaintiff-Appellee,* 11065 *vs.* Norton I. Kretske, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

Certificate of Clerk of the United States Court of Appeals for the Seventh Circuit.

STATUTES INVOLVED.

Title 18 U. S. C. A. § 2: *Principals:*

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

Title 18 U. S. C. Section 2311: *Definitions:*

As used in this chapter:

* * * * *

"Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

Title 18 U. S. C. Section 2315: *Sale or receipt of stolen goods, securities, or monies:*

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000.00 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

* * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 30. Instructions:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instructs the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52. Harmless Error and Plain Error:

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.